

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Review of the Section 251 Unbundling	)	CC Docket No. 01-338
Obligations of Incumbent Local	)	
Exchange Carriers	)	
	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions of the Telecommunications Act	)	
Of 1996	)	
	)	
Deployment of Wireline Services Offering	)	CC Docket No. 98-147
Advanced Telecommunications Capability	)	

**COMMENTS OF SBC COMMUNICATIONS INC.**

SBC Communications Inc., for itself and its wholly owned affiliates<sup>1</sup> (“SBC”), submits the following comments in response to the Federal Communications Commission’s (“Commission”) Further Notice of Proposed Rulemaking (“FNPRM”) released in the above-captioned proceeding.<sup>2</sup>

**I. INTRODUCTION AND SUMMARY.**

In the FNPRM, the Commission properly recognizes that its current interpretation of Section 252(i) discourages the meaningful give-and-take negotiations between carriers envisioned by Congress. Section 252 plainly reflects Congress’ preference for voluntarily negotiated interconnection agreements between incumbent local exchange carriers (“ILECs”) and competitive local exchange carriers (“CLECs”) without the need for regulatory intervention,

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<sup>1</sup> SBC Communications Inc. (“SBC”) files these Comments on behalf of its subsidiaries, Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma, SBC Missouri, SBC Kansas, SBC Arkansas and SBC Texas, The Southern New England Telephone Company, Nevada Bell Telephone Company, d/b/a SBC Nevada, Pacific Bell Telephone Company, d/b/a SBC California, Illinois Bell Telephone Company, d/b/a SBC Illinois, Indiana Bell Telephone Company Incorporated, d/b/a SBC Indiana, Michigan Bell Telephone Company, d/b/a SBC Michigan, The Ohio Bell Telephone Company, d/b/a SBC Ohio and Wisconsin Bell, Inc. d/b/a SBC Wisconsin.

<sup>2</sup> Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, et al., *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) (“FNPRM”).

and provides for state-run arbitrations only as backstops where voluntary negotiations fail. The Commission's current pick-and-choose rule has discouraged such negotiations by automatically making available to all CLECs any concession an ILEC makes without regard to the concessions and consideration offered by the original CLEC to obtain that benefit. The Commission now acknowledges, as it must, that its existing rule is inconsistent with Congress' goal of encouraging negotiated interconnection arrangements, and therefore tentatively concludes that it should reinterpret section 252(i) to restore incentives for carriers to engage in meaningful commercial negotiations, while maintaining safeguards against discrimination.<sup>3</sup> In particular, it proposes to eliminate the application of the current pick-and-choose rule to an ILEC's interconnection agreements conditioned upon the ILEC's filing and obtaining state commission approval of a statement of generally available terms ("SGAT"), which itself would be subject to the pick-and-choose rule. Conversely, if an ILEC elects not to file a SGAT, the ILEC's interconnection agreements would remain subject to the existing pick-and-choose rule.<sup>4</sup>

The Commission's current proposal still misses the mark. Far from encouraging market-based solutions, conditioning a departure from the existing pick-and-choose rule on state approval of a SGAT (particularly a SGAT that, itself, is subject to pick-and-choose) would only discourage voluntary negotiations. First, the SGAT approval process itself – which essentially is a mega-arbitration with multiple CLECs at the table, all pressing their own, unique demands – is extremely resource intensive, and often results in terms that an ILEC would perceive as unfavorable. Second, even where the resulting SGAT is fair and balanced (and they may not be), under the Commission's proposal, CLECs could use the SGAT solely as a starting point for negotiations, taking the benefit of any issues they won in the mega-arbitration, and re-litigating all other issues. No rational ILEC would avail itself of this option.

Rather than conditioning a departure from the pick-and-choose rule on state approval of an SGAT, the Commission should simply eliminate that rule and interpret section 252(i) to

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<sup>3</sup> *Id.* at ¶ 722.

<sup>4</sup> *Id.* at ¶ 725.

require a requesting carrier availing itself of its most favored nations (“MFN”) rights to adopt all rates, terms and conditions of an approved interconnection agreement that are available for adoption under section 252(i), namely, interconnection, service and/or unbundled network elements.<sup>5</sup> Only by ensuring that ILECs will receive the benefits of their bargains (*i.e.*, any negotiated concessions), will the Commission promote voluntary negotiations and innovative, market-based solutions that meet the needs of individual carriers, rather than the homogenized agreements that predominate in the market today.

## **II. THE COMMISSION SHOULD RECONSIDER THE PICK-AND-CHOOSE RULE.**

The Commission’s existing pick-and-choose rule is inconsistent with the structure and goals of section 252. In that section, Congress made clear its preference for voluntarily negotiated interconnection arrangements without the need for regulatory intervention, reflecting its view that carriers are better able to develop arrangements that meet their own unique needs through commercial negotiations than regulators ever could. It therefore expressly authorized carriers to negotiate binding interconnection agreements “without regard to the standards set forth in . . . section 251.”<sup>6</sup> And it authorized them to seek state mediation or arbitration only if parties failed to reach a negotiated agreement.<sup>7</sup>

The Commission’s pick-and-choose rule completely undermines ILEC incentives to negotiate innovative, individually tailored interconnection arrangements, by permitting CLECs to cherry-pick individual provisions of any approved interconnection agreement without any obligation to accept the other provisions and obligations of that agreement. As a consequence, an ILEC cannot rationally engage in normal, commercial negotiations regarding its obligations under section 251(c) of the Act because any concession it makes automatically will be available to every other potential entrant without regard to the consideration the ILEC received for making

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<sup>5</sup> If an interconnection agreement contains terms that are not covered by section 252(i) and the agreement specifies that those terms were negotiated as concessions related to items covered by 252(i), then an adopting carrier should be required to adopt those terms as well.

<sup>6</sup> 47 U.S.C. §252(a) (1).

<sup>7</sup> *Id.* at §252(a)(2) and (b).

that concession in the first place. Because the pick-and-choose rule thus undermines Congress' goal of encouraging negotiated interconnection arrangements, the Commission must reinterpret section 252(i) to restore incentives for carriers to engage in meaningful commercial negotiations.

### **III. THE COMMISSION'S PROPOSAL WOULD NOT ENCOURAGE INNOVATIVE, MARKET-PLACE SOLUTIONS.**

Instead of encouraging market-based solutions, the Commission's proposal will perpetuate the homogenized, one-size-fits all agreements that predominate in the market today. Rather than simply eliminating the pick-and-choose rule, as it should, the Commission proposes to condition any departure from that rule on state approval of an SGAT, which, itself, would be subject to pick-and-choose. In particular, the Commission proposes the following rule as an alternative interpretation of 252(i):

If incumbent LECs do not file and obtain state approval for a SGAT [statement of generally available terms], the current pick-and [-] choose rule would continue to apply to all approved interconnection agreements between the incumbent LEC and other carriers. If incumbent LECs do file and obtain state approval for a SGAT, however, the current pick-and-choose rule would apply solely to the SGAT, and all other approved interconnection agreements would be subject to an "all-or-nothing" rule requiring carriers to adopt the interconnection agreement in its entirety.<sup>8</sup>

No rational ILEC would avail itself of this burdensome option. The SGAT approval process, which would be little more than a mega-arbitration with multiple CLECs (each pressing its own, unique demands), would be extremely complex and resource intensive, and the statement of generally available terms that emerged from that process would often result in terms that an ILEC would perceive as unfavorable. But, even where the resulting SGAT is balanced, CLECs could (under the Commission's proposal) simply use the SGAT as a starting point for further negotiations – taking the benefits of any issues they won in the mega-arbitration and negotiating or re-litigating all other issues.

SBC's first hand experience "negotiating" analogous SGATs/contracts with state Commissions confirms that the foregoing concerns are not mere speculation. For example, in order to obtain 271 approval, Southwestern Bell Telephone, L.P., SBC's operating company

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<sup>8</sup> FNPRM at ¶ 725.

subsidiary in Arkansas, Kansas, Missouri, Oklahoma and Texas (collectively “the SBC ILECs”) “negotiated” section 271 interconnection agreements with each of its state Commissions with the goal of creating a set of interconnection terms and conditions that would permit CLECs expeditiously to enter the market. In order to obtain state approval for these agreements, the SBC ILECs were forced to engage in enormously expensive, laborious, lengthy and resource intensive collaborative sessions, hearings, comments, and other proceedings. The SBC ILECs further were required to make significant concessions on a host of issues, and incorporate many of the most onerous bilateral arbitration results from other proceedings, including arbitrated rates, into those agreements (“x2A Agreements”).

In an attempt to achieve some balance, each of the state commissions, in exchange for these concessions, incorporated a “Legitimately Related Provisions” attachment (“MFN Attachment”) to the x2A Agreements, which sought to provide the SBC ILECs protection against CLEC “cherry-picking” by requiring the CLECs either to adopt the entire x2A Agreement or portions of the x2A Agreement so long as they also accepted all legitimately related rates, terms and conditions. CLECs routinely have sought to avoid complying with these MFN Attachments by using the most advantageous provisions contained in the x2A Agreements as places to *begin* voluntary negotiations under section 252(a)(1), and sought (and, in at least one case, obtained) additional, more favorable arbitrated provisions.<sup>9</sup>

Based on SBC’s experience, no ILEC would opt to offer an SGAT, which itself would be subject to pick-and-choose, in order to obtain the limited relief from the existing pick-and-choose rule offered by the Commission’s proposal. The Commission’s proposal to condition any departure from the pick-and-choose rule on state approval of an SGAT thus would perpetuate the status quo.

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<sup>9</sup> *Petition of MCIMetro Access Transmission Services, L.L.C., et al for Arbitration with Southwestern Bell Telephone Company Under The Telecommunications Act of 1996*, Texas PUC Docket No. 24542, Revised Arbitration Award and Order (December 5, 2002).

**IV. THE COMMISSION SHOULD REINTERPRET SECTION 252(i) TO REQUIRE A CARRIER EXERCISING ITS MFN RIGHTS TO ADOPT ALL INTERCONNECTION, SERVICE AND/OR UNE ARRANGEMENTS CONTAINED IN AN AGREEMENT.**

The Commission should interpret 252(i) to require a carrier exercising its MFN right to adopt *all* interconnection, service and/or UNE arrangements contained in an approved interconnection agreement. The Act provides that an incumbent “shall make available any interconnection, service, or network element provided under an agreement” to “any other requesting telecommunications carrier *upon the same terms and conditions* as those provided in the agreement.”<sup>10</sup> This is a basic nondiscrimination principle that is designed to ensure that carriers seeking to enter the market at a later date (“Adopting Carriers”) expeditiously can obtain the same terms and conditions as carriers who have negotiated before them, so long as the Adopting Carriers are willing to accept all the terms that formed the earlier bargain. Interpreting section 252(i) to require CLECs to accept all the terms in an agreement not only is consistent with the language of that provision, it also ensures that an incumbent could not restrict a particular service to a specific carrier, and that a subsequent carrier quickly could enter the market by adopting previously negotiated or arbitrated agreements.

Requiring an Adopting Carrier to accept all the terms in the agreement that are available for adoption under section 252(i) would also promote Congress’s goal of promoting meaningful negotiations between carriers. An ILEC no longer would fear the consequences of making concessions in negotiations because the ILEC’s negotiated concessions would be free from manipulation or arbitrage by a subsequent carrier.<sup>11</sup> ILECs thus would be encouraged to negotiate tailor-made agreements that resolve specific problems or correspond to a competing carrier’s specific priorities, resulting in innovative and efficient agreements.

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<sup>10</sup> 47 U.S.C. §252(i) (emphasis added).

<sup>11</sup> A recent trend that illustrates this behavior is CLECs’ attempts to adopt contract amendments that contain date-specific rate effective dates and arguing for retroactive application of the rates contained in the amendment. If allowed, an Adopting Carrier could obtain billing adjustments for services rendered that pre-date the effective date of that carrier’s adoption of the amendment.

The Commission's concerns that CLECs somehow would be harmed without a pick-and-choose option are vastly overstated. Indeed, concerns that ILECs will be able to exercise unequal bargaining power to delay CLEC entry or extract anticompetitive concessions from CLECs are belied by the results in state proceedings over the past seven years. If anything, the states have tipped the scales in the CLECs' favor, as evidenced by the downward spiral of TELRIC rates and decisions that require reciprocal compensation for ISP bound traffic. State commission oversight of the negotiation and arbitration process thus protects CLECs from delay and more than offsets any purported bargaining power ILECs might otherwise have had.

**V. THE COMMISSION HAS AUTHORITY TO AMEND ITS INTERPRETATION OF SECTION 252(i) AS LONG AS THE INTERPRETATION IS A REASONABLE INTERPRETATION OF THE STATUTE.**

The Commission has ample authority to eliminate its existing pick-and-choose rule and limit CLEC's rights under section 252(i) to opt-in to all terms in the agreement that are available for adoption under section 252(i). The courts long have recognized that a previous court's finding that an agency's interpretation of an ambiguous statutory provision is reasonable, does not prevent an agency from subsequently adopting a different reasonable interpretation.<sup>12</sup> Thus, it is beyond dispute that the Commission has authority to amend the rule as long as the Commission supplies a reasoned analysis for effecting the change.<sup>13</sup>

Nothing in *Iowa Utilities Bd.* prevents the Commission from interpreting section 252(i) to require the adoption of all interconnection, service and/or UNE arrangements contained in an interconnection agreement. To be sure, the Supreme Court stated, in dicta, that the pick-and-choose rule was "the most readily apparent" reading of section 252(i). At the same time, however, the Court found that requiring a CLEC to "accept all the terms in an agreement" was "eminently fair."<sup>14</sup> In any event, the Court made clear that the pick-and-choose rule was one

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<sup>12</sup> See *Clinchfield Coal Co. v. Federal Mine Safety and Health Commission*, 895 F.2d 773, 777 (D.C. Cir. 1990).

<sup>13</sup> See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970) (stating that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed.").

<sup>14</sup> *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 395-397 (1999)(*Iowa Utilities Bd.*).

“reasonable” interpretation of section 252(i) under *Chevron*, not that it was compelled by the statute. Indeed, the Court specifically acknowledged that the Commission might reconsider the pick-and-choose rule if it found that its approach “significantly impede[d] negotiations,” which it said was “a matter eminently within the expertise of the Commission and eminently beyond our ken.”<sup>15</sup> The Court therefore did not find that Congress had “clearly resolved the issue,” and left the Commission “free to choose . . . [another interpretation] if reasonable.”<sup>16</sup>

**V. CONCLUSION.**

The Commission should discard the pick-and-choose rule and interpret section 252(i) to require CLECs to adopt all rates, terms and conditions associated with interconnection, service and/or unbundled network elements contained in an approved interconnection agreement.

Respectfully submitted,

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<sup>15</sup> *Id.*

<sup>16</sup> *Clinchfield Coal Co. at 777-78; Adelphia Communications Corp. v. FCC* 88 F.3d 1250, 1255 (D.C. Cir. 1996).